IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

ELECTION APPLICATION No 3 of 1999

WITH

ELECTION APPLICATION No 5 of 1999

IN

ELECTION PETITION No 1 of 1998

For Approval and Signature:

Hon'ble MR.JUSTICE M.S.PARIKH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES Yes

2. To be referred to the Reporter or not? Yes :

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO No

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : No

5. Whether it is to be circulated to the Civil Judge? No:

KHUSHIRAM DUNGROMAL JESWANI

Versus

DHIRUBHAI AMARSINH CHAVDA

Appearance:

MR YOGESH S LAKHANI for Petitioner

MR HM PARIKH for Respondent No. 1

MR YV BRAHMBHATT for Respondent No. 2

NOTICE SERVED BY DS for Respondent No. 3, 4, 5, 6

CORAM : MR.JUSTICE M.S.PARIKH

Date of decision: 14/08/2000

ORAL JUDGEMENT

1. By consent of the learned counsels appearing for both the sides, both these applications have been taken up for hearing and disposal together.

2. By way of Election Application No. 3 of 1999 the petitioner has sought for amendment of the main petition by way of addition of para. 8A between para. 8 and para. 9. Following averments have been prayed to be added :-

"8A. The petitioner alternatively submits the facts stated hereinabove amount to corrupt practice within the definition of Sec. 123 (8) of the Representation of Peoples Act."

3. In so far as the aforesaid amendment is concerned, there is no serious contest for the grant of amendment except that the amendment has been prayed for at a belated stage. The amendment as aforesaid seeks to explain what has already been alleged in the election petition. It neither changes the cause of action nor causes prejudice to the contesting respondent or any other of the respondents. Hence, the same deserves to be granted, but as per the order that is to follow.

4. By way of Election Application No. 5 of 1999 the petitioner has sought for addition of following para. (4A) (i) and (ii) between paras. 4 and 5 of the main petition. That would read as under :-

"4A (i) That the petitioners' polling agents were not allowed to sit at the above polling stations by giving threats emanating from the supporters of the opponent No. 1 returned candidate. The threat was given by three persons of the polling agent of opponent No. 1 and his supporters. Under the circumstances, there was no polling agent of the petitioner at the polling booth at Prathmik Shala, Matar and no resistance or may be with passive connivance of the Presiding Officer. The booth capturing was facilitated by the Jayeshbhai Vishnubhai Barot, Dipakbhai Vishnubhai Barot and

Paresh Vishnubhai Barot and Munnabhai @ Bhanabhai Barot and his supporters in respect of the aforesaid booths. The complaint was also made to the observer Shri Sharma Rao and Shri Khan but no action has been taken. On the contrary, the petitioner was threatened to be attacked in presence of the observers and the petitioner was required to be escorted by the polling officers. In the aforesaid facts, the petitioner submits that the result of the election has been materially affacted by non compliance, non observance or by committing breach of the obligations, duties cast upon the Presiding Officer and other election officers for conducting the election in a free and fair manner.

(ii) The petitioner submits that the petitioner has already mentioned the material facts in the aforesaid paragrapahs 3 and 4 and given some particulars which are being amplified by giving further particulars of booth capturing referred in the aforesaid paragraphs."

5. It has been the stand of the petitioner that what has been stated in the proposed paragraphs to be added is amplification of the material facts and some particulars already given in paras. 3 and 4 of the petition. The aforesaid proposed additions are sought for by way of amplification by giving further particulars of booth capturing referred to in the above paragraphs.

6. Before the submissions made by the learned advocates for the rival parties are taken into consideration it would be appropriate to state what the petitioner has already stated in paras. 3 and 4 of the petition. The said paras. would read as under :-

"3. The applicant humbly submits that on the day of polling i.e. on 28/2/1998 when the applicant with his election agent was visiting different polling centres, it was found by the applicant that in the following centres situated at Matar town serious irregularities were being applied and to a great extent bogus voting was being done.. The applicant has started informing from the morning hours at the office of the Mamlatdar, Matar as well as at Matar Police station. However, there was no improvement. On

the contrary the extent of bogus voting was found increasing. It was also found that the persons who have already voted and on whose fingers the black spot in confirmation to have been voted is found, the presiding officers of the concerned polling centres were not preventing such persons and even the police officials did not try to control the situation. It was also found that the real and genuine voters were deprived of voting and at their place the fictitious persons have exercised the voting power illegally and by adopting the means of bogus voting. The applicant has addressed a letter on 28/2/1998 itself while the voting was on pointing out all these facts requesting to pass appropriate order for repolling on 9 polling centres being polling centres "Matar-1 to Matar-9". The said application is received by Mamlatdar, Matar and it is duly acknowledged by him. And another copy is also given to the opponent no. 1 himself at 15.35 hrs. pointing all these facts. The applicant has also orally requested the opponent no. 1 in person to make an appropriate arrangement to prevent such bogus voting and to provide sufficient police force to prevent the same.

4. The applicant further submits that in the aforesaid polling centres the mob and the crowd and the group of persons entered and video recording was also done about the same by the Government machineries and on the face of it proves that free and fair election has not taken place. The applicant submits that even his polling agents were not allowed to sit in the above polling centres and they were driven out by giving threats by the supporters of the opponent no. 1 who belongs to another recognised political party, National Congress. The applicant submits that after the aforesaid applications were given in the noon hours, Election Commissioner was also intimated by the applicant by sending the copy of the aforesaid application through fax and the Chief Election officer was also informed at Gandhinagar. The applicant humbly states and submits that at about 4.30 p.m. the observers Shri Sharma Rao and Shri Khan visited the primary school polling centre and the applicant was explaining situation prevailing there and in the meanwhile very big

crowd gathered and before the applicant and others could understand anything, the applicant and others were attacked in presence of the observers Shri Sharma Rao and Shri Khan. The complainant has filed a criminal complaint about the said incident on the same day against 4 persons and others for the offence under sections 143, 147, 504, 323 and 188 of the Indian Penal Code. The applicant submits that the applicant was removed from that place under the police protection to the Mamlatdar's office. The applicant humbly submits that even the deputy Mamlatdar, Election, has also filed his complaint on 5-6/3/1998 before the Police Sub-Inspector, Matar Police Station making specific allegations having seen the video-graph of the video recording.

7. At this stage it might be noted that the issues were framed at exh. 27 on 27/1/1999. They would read as under :-

"I. Is the present Election Petition not maintainable at law on the grounds set out in the written statement ?

II. Is it proved that there was any atmosphere of quarrel, fear and bogus voting before date of polling in 11 villages including Matar town as alleged?

If yes, what is its effect ?

III. Is it proved that there was large scale bogus voting at the polling centres particularised in the petition as alleged ?

If yes, what is its effect ?

IV. Is it proved that the applicant and other persons were attacked and assaulted on 26/2/1998 ?

If yes, what is its effect ?

V. Is it proved that the polling was not done in a fair and free atmosphere at number of polling centres as particularised in the petition and is it

further proved that the process of election has been adversely affected thereby ?

VI. What order ?"

The aforesaid issues were framed after hearing the learned advocates and considering the proposed issues and the pleadings in the main matter.

8. By application exh. 44 dated 12/7/1999 the learned advocate for the first respondent prayed for hearing issue no. 1 as preliminary issue saying that it will go to the root of the matter. While the said application was to be heard first Election Application was given on 5/7/1999, though it was affirmed on 21/6/1999. The second application was given on 5/8/1999.

9. In both the Election Applications Rule was issued and after service of rule to all concerned parties including contesting respondent no. 1 and after hearing the learned counsels appearing for the petitioner and the contesting respondent no.1, these applications are taken up for disposal today.

10. It has been submitted on behalf of the petitioner that proposed amendment will not alter the cause of action or introduce any new corrupt practice, but it merely elaborates some more particulars with regard to the corrupt practice which has been alleged in the main petition. It has also been submitted that the 1st respondent who is the contesting respondent will not be prejudiced if proposed amendment is allowed. In reply, it has been submitted on behalf of the 1st respondent that in major part of the main petition corrupt practice was not charged against 1st respondent or his election agent or his persons. In the proposed amendment there is a reference to the 1st respondent with regard to the alleged corrupt practice. When this fact was brought to the notice of learned counsel for the petitioner he saw to an affidavit being filed by the petitioner stating and specifying that the amendment sought as aforesaid is restricted to the polling booths at Prathmik Shala, Matar only. Now on going through the allegations contained in para. 4 of the main petition it would appear that the averments that the applicant's polling agents were not allowed to sit in the above polling centres and they have been driven out by giving threats by the supporters of opponent no. 1 belonging to another recognised political

party, National Congress have already been made. The petitioner has also given details of the incident by filing affidavit of a practising advocate of Nadiad Mr. Rakesh Natvarlal Rao. Thus in the background of the general allegations contained in the main petition, more particularly reproduced from paras. 3 and 4 of the main petition, it would appear that the proposed amendment seeks to set out some clarification and some more particulars.

11. I have considered the decisions which have been referred to by both the learned counsels. It is true that it is necessary to aver specifically particular corrupt practice and material facts in that regard have to be pleaded at the threshold. All the primary facts which must be proved at the trial to establish corrupt practice so pleaded have to be stated at the threshold. In the context of a charge of corrupt practice "material facts" would mean all the basic facts constituting the incredients of the particular corrupt practice alleged. "Particulars", on the other hand, are "the details of the case set up by the party". Thus material particulars mean all the details which are necessary to amplify, refine and embelish the material facts already pleaded in the petition in compliance with the requirements of the particular clause [clause (a) of section 83 (1)]. The "particulars" serve the purpose of finishing touches to the basic contours of a picture already drawn, to make it full, more detailed and more informative (see Udhav Singh v. M.R. Scindia AIR 1976 S.C. 744) Following observations referred to from F.A. Sapa v. Singora (1991) 3 S.C.C. 375 in Shethi Roop Lal v. Malti Thaper (1994) 2 S.C.C. 579 might usefully be referred to :-

"(i) Our election law is statutory in character as distinguished from common law and it must be strictly complied with

(ii) There is a clear and vital definition between 'material facts' referred to in section 83 (1)(a) and 'particulars' in relation to corrupt practice referred to u/S. 83(1)(b) of the Act.

(iii) Section 86(5) of the Act empowers the High Court to allow particulars of any corrupt practice which has already been alleged in the petition to be amended or amplified provided the amendment does not seek to introduce a corrupt practice

which is not previously pleaded.

(iv) By implication amendment cannot be permitted so as to introduce material facts."

12. Considering the aforesaid propositions of law and bearing in mind the facts concerning the proposed amendment and the original averments in the petition, I am of the opinion that in view of the specification made by the petitioner what the petitioner seeks to introduce is some more particulars and clarifications and not new material fact of the corrupt practice already alleged. No new corrupt practice is sought to be introduced by proposed amendment. I have also borne in mind the similar propositions of law as appearing in Mahendra Pal v. Ram Dass Malanger 1999 AIR S.C.W. 4130.

13. In above view of the matter, following order is required to be passed; although on account of delay petitioner shall have to be saddled with cost.

14. The amendments prayed for in both the Election Applications as noted hereinabove are allowed subject to petitioner depositing in this Court by way of cost a sum of Rs.5,000/- (Rupees five thousand only) on or before 25/8/2000, failing which the amendments shall stand not granted. Upon the petitioner depositing such amount, he shall be under permission to amend the main petition as per the above order and such amendment shall be carried out on or before 1/9/2000.

The main election petition shall be placed for further hearing on 8/9/2000. Out of the amount of Rs.5,000/- as and when deposited, a sum of Rs.2,500/- shall be paid over to the 1st respondent by way of cost and a sum of Rs.2,500/- shall go to the High Court Legal Aid.

Rule made absolute in the above terms in both the Election Applications.

A copy of this judgment shall be placed in the main petition and given a separate exhibit.

* * *

PVR.